CITY OF PORT ANGELES
WASHINGTON, U. S. A.
Public Works & Utilities Department

August 16, 2005

Mr. Jay Manning, Director
Washington State Department of Ecology (DOE)
P.O. Box 47600
Olympia, WA 98504-7600

RE: NPDES Phase II Stormwater Permit, City of Port Angeles Designation Concerns

Dear Mr. Manning:

The City of Port Angeles should not be designated by the Department of Ecology as a City that will be regulated under the NPDES Phase II Stormwater Permit. Our concerns are in line with those of the Association of Washington Cities (attached) and the American Public Works Association Storm Water Managers (attached). In addition the City of Port Angeles questions the basis for our designation. Our specific issues are related to our City's size, surrounding area, financial ability, and existing regulatory permits regarding water quality in our community.

The City of Port Angeles does not meet the size and density criteria to be included as a Phase II City, even if the surrounding UGA population is included. The City of Port Angeles is surrounded on three sides by unincorporated Clallam County. The east and west areas are the City's urban growth areas. These areas are part of the City's drainage basin. At a recent workshop DOE Staff affirmed that if the City was designated a Phase II community these areas would not be included. Only the area within the City would be included under Phase II permit. If this area limitation is imposed it would require the City to accept unregulated stormwater flows. This creates an unworkable situation. It will put the City in the unacceptable position of trying to work with adjacent jurisdictions without the authority to require compliance. This will require added work and costs to comply with Phase II. Phase II areas should be defined by UGA limits and watershed limits. The City of Port Angeles should not be included in Phase II until this is resolved.

Designation of the City of Port Angeles as a Phase II Community will place additional financial hardships on an already heavily burdened community. The City, to meet DOE requirements for earlier Secondary Treatment and current CSO permitting, is already pushing our taxpayers to the EPA financial hardship level for a community of our size and income. Adding the unfunded mandate of Phase II to this burden is unacceptable.

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The City of Port Angeles, being a CSO City, is already heavily regulated by DOE and is pursuing an aggressive program to meet the requirements of our permit. Our CSO reduction plan, following discussions with DOE staff, has been submitted to DOE for review. The plan, as submitted, proposes a $30 to $40 million dollar capital program to meet the requirement of one CSO event per discharge point per year. The primary concern with the program is the time period for compliance. We have proposed a program that keeps the utility rates within the EPA affordability range and the time period would be based on availability of sufficient grant and low interest loan funding.

In addition to the CSO permitting requirements, the City of Port Angeles complies with water quality permitting requirements of Federal ESA, Corps of Engineers, Tribal, DNR, WDF HPA, DOE, Shorelines, Critical Areas and other mitigation measures resulting from SEPA/NEPA.

The City of Port Angeles is requesting DOE to reconsider designation of our City as part of Phase II. The City is already heavily regulated in regards to water quality and cannot afford the additional costs to implement Phase II. Imposing Phase II on the City of Port Angeles most likely will not accelerate the rate of water quality clean up. It will only add another unfunded layer of deadlines, monitoring, testing, and staffing that the City's residents cannot afford. In addition, the NPDES Phase II requirements proposed by DOE will essentially require adoption of the DOE Stormwater Manual, which was originally intended to be used only for guidance and not as a requirement.

Another concern is that the City of Port Angeles has not been contacted directly by staff on an issue of this importance. All contact has been by bulk mailings. A direct meeting with the City of Port Angeles or with other bubble cities would have been appropriate to explain why they have been selected. My staff and I are available to meet with you and your staff to discuss our concerns.

I am forwarding a copy of this letter to Charlene Witczak of your staff as representing the City of Port Angeles' comments on the Phase II Stormwater Permits due August 16, 2005.

Sincerely,

Glenn A. Cutler, P.E.
Director of Public Works and Utilities

Attachments: AWC Letter, APWA SWM Summary

cc: Charlene Witszak, DOE
Janice Sedlak, DOE

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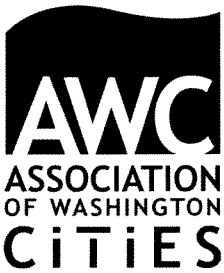


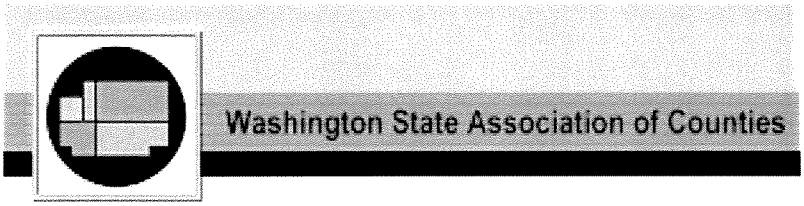


Mr. Jay Manning, Director
Washington State Department of Ecology (DOE)
P.O. Box 47600
Olympia, WA 98504-7600

RE: NPDES Phase II Stormwater Permit – Concerns with draft permit and rule, and request for meeting in advance of Aug. 19 to discuss options and alternatives

Dear Mr. Manning:

We write on behalf of the cities and counties in our Associations required to adopt Phase II NPDES permits under the Federal Clean Water Act. We appreciate the considerable work the Department of Ecology has put into the draft requirements for NPDES Phase II permits. However, there are numerous concerns, so we are asking that you and appropriate Ecology staff meet with a group of us in advance of the August 19 comment deadline to explore options and alternatives to some items in the current preliminary draft.

First, let us underscore that Phase II cities and counties feel strongly about having a Phase II permit that offers them coverage and legal certainty regarding stormwater, and gives them guidance to help meet environmental stewardship responsibilities. We want to see the permit finalized – sooner rather than later. At the same time, Phase II jurisdictions do not believe the permit is workable in its current form, and believe it is critical that we develop mutually acceptable options. Without delving into minutiae, here are our major concerns:

**Monitoring:** The draft permit proposes to require the 85 Western Washington Phase II jurisdictions develop comprehensive stormwater monitoring plans, and do so in a way that demonstrates the Ecology manual, BMPs, and approaches to stormwater discharges will result in improvements to water quality and overall environment. The cost implications of this requirement are enormous, and the expectation of what is to be achieved is simply beyond what we consider reasonable. There are simply too many variables and factors that affect environmental conditions – involving non-point sources and other things beyond our control -- for us to specifically measure how stormwater programs and BMPs are improving water quality. We would like to present an alternative monitoring plan that is more achievable, with programmatic and adaptive management features that can be more easily measured.

**Pre-development, forested conditions – and legal 'takings' concerns**: Language in the permit as drafted requires that stormwater flows be mitigated to meet a standard of pre-development, forested conditions. We believe that in urban and urbanizing environments, this standard is unattainable and raises serious legal concerns. We have consulted with City Attorneys and County Prosecuting Attorneys who strongly believe that mitigation requirements outlined in the draft permit would leave jurisdictions very vulnerable to "takings" claims. Specifically, attorneys have cited the *Nollan vs. California Coastal Commission* and *Dolan v. City of Tigard* cases, as well as a March 1995 memorandum from the State Attorney General's

Office that reads in part, "...a permit condition which imposes substantial costs or limitations on property uses could be a taking. In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts will consider the public purpose of the regulatory action along with the extent of reduction in use of and economic impact on the property. The burden on the property owner must be roughly proportional to the adverse public impact sought to be mitigated."

**"New discharge" definition**: Language in the permit seems to imply that *any* change to an existing outfall – even replacing a culvert to comply with Washington Department of Fish and Wildlife guidelines – is to be defined as a "new discharge." Additionally, the permit requires application of the DOE Manual or equivalent. This would require changes to plans in the review process. This would appear to fly in the face of vesting laws, and would place major burdens on our jurisdictions. We would like to discuss language modifications to clarify that replacement of failing or inadequate outfalls does not qualify as a 'new' stormwater discharge and that recognizes state vesting laws.

**Deadlines that are unattainable**: The Phase II permit as drafted contains a wide array of adoption deadlines and inspection frequencies, many of them within one year. These will be difficult to impossible to achieve, particularly for the smaller Phase II jurisdictions that do not yet have a formal stormwater program.

**Testing and reporting requirements**: If DOE wants all existing BMPs subjected to testing, we believe the Department should bear the cost and responsibility for that testing, not counties and cities. We also are concerned that the reporting requirements in the draft permit will be too burdensome – particularly for smaller jurisdictions – and that annual reporting of things such as expenditures is a subjective measurement that doesn't improve the environment or stormwater programs in general. We would like to explore other options for frequency and content of reporting requirements.

**Assumptions regarding adoption of the DOE stormwater manual**: The Phase II draft makes the tacit assumption that jurisdictions should adopt the DOE stormwater manual as Best Available Science (BAS). The manual – which was intended to be used for guidance only and not as a requirement – contains a number of conditions that are of serious concern to jurisdictions. For example, it classifies replacement and maintenance actions of already-impervious surfaces, including roads, as redevelopment. In addition, there is concern that the option to adopt an equivalent manual that recognizes municipality-specific conditions is not provided in Phase II as it is in Phase I.

**Fiscal, liability, and staffing concerns**: We are concerned that Phase II jurisdictions will be paying new permit fees, and yet Ecology will not have staffing in place to properly review the Phase II programs that will be submitted. This leaves cities and counties wondering what we are paying for, and whether there will be the "coverage" that we saw as a central reason to go forward with a Phase II permit requirement in the first place. If standards are too high, and administrative review and protection is haphazard, *our* liability exposure is actually *increased*, rather than *reduced*, as was intended.

Overall, the Draft Phase II permit appears to go well beyond the six mandatory minimum EPA guidelines "+ 2" agreement that local jurisdictions and DOE agreed to through the advisory committee process in late 2003. It also goes beyond what has been adopted in many other states which do not require any monitoring element (other than evaluation of program

compliance) for Phase II jurisdictions. As such, we are very concerned about costs, unfunded mandates, practicability, and legal 'takings' issues.

Therefore, we ask for time with you and senior staff in advance of August 19 to meet and begin the work of exploring mutually acceptable alternatives. We will be in touch with your office soon to schedule the meeting. Once again, we would like to express our appreciation for Ecology's work to date on this important issue.

Sincerely,

Dave Williams
Staff Associate
Association of Washington Cities

Paul Parker
Assistant Executive Director
Washington State Association of Counties

cc: Bill Moore, Department of Ecology

APWA Stormwater Manager Phase II Comments July 15, 2005

1) Jurisdictions uniformly agree that the DOE should not attempt to conduct research on BMP effectiveness on the backs of permittees. A better option would be for DOE to contract with an independent third party to conduct such evaluations. An advisory committed consisting of jurisdictions should be formed to help decide what BMP's need further evaluation above and beyond that already done by others locally as well as nationally. As a means to fund this effort, a surcharge could be placed on all permittees. While this may sound expensive, it would be far cheaper to do thus than ask each jurisdiction to do their own "wet chemistry". Further, it was the feeling of the group that QA/QC would be much better and the results applicable across a wider range of watersheds.

2) Jurisdictions object to DOE "pushing down" their responsibility to identify facilities needing NPDES permits. This is not our obligation.

3) Jurisdictions feel strongly that the DOE needs to be adequately staffed with trained personnel capable of reviewing and approving any submittals for NPDES permits. Collecting a fee but being unable to review alternative manuals, annual reports, maps, etc., is unacceptable. There is no certainty or liability shield as minimal as it may be as proposed in the permits and presentations by DOE staff.

4) Coordination with other jurisdictions should be encouraged but not a permit requirement. Watershed planning efforts have shown how difficult and, in many cases, impossible this is to accomplish.

5) Utilization of forested conditions as a pre-developed condition for redevelopment causes jurisdictions extensive legal liability for a takings claims. Each jurisdiction should ask their legal staff to review this section. There is no nexus between the proposed action and the amount of mitigation required. This is a huge issue.

6) Requiring jurisdictions to view conversion of hardened surfaces such as gravel roads used for many years to asphalt as "new construction" will result in fewer roads being converted and remaining substandard for the traveling public. Further, converting gravel shoulders to paved has the same issues. Similar issue as the pre-forested conditions issue.

7)The current definition of new discharge and its apparent certification by the local jurisdiction for new developments not causing water quality standards exceedence even after application of the Ecology Manual causes many concerns. Who is liable if an exceedence occurs after development is approved and built?

8) The current proposal in the permit to require new developments to use

the DOE Manual ( or equivalent) within a short period of time after adoption ignores state vesting laws. This creates an automatic violation of the permit if vesting laws are followed; if not, then it creates an automatic violation of state laws...either way we get sued and lose.

9) The current phase II permit appears to shift from a technology based permit to a standards based one contrary to what was agreed to by the DOE and the Westside Stormwater Committee in 2003.

10) The deadlines are unreasonable for the majority of the Phase II permittees and the Phase I deadlines are difficult at best to achieve with no net benefits to the environment. Further, the number of submittals and types of reports needed appear to be mainly busy work or for no known reason and outside the CWA obligations.

11) The requirement to submit all data in GIS formats conforming to the State's standards is unworkable. Many smaller jurisdictions do not have GIS systems and for those that do, making the data available on their web site would be adequate and not require extensive efforts.

12) Monitoring should only be focused on the program elements. If DOE wants monitoring for other things, see #1 above. Compliance monitoring of permit commitments appears to be reasonable, standards monitoring is not.